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IN THE

Supreme Court of the United States

October Term, 1958.

No. 100.

HARRY J. ALKER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner's Reply Memorandum.

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PETITIONER'S REPLY MEMORANDUM

The nature of the Government's opposition renders appropriate—and necessary—a few words in reply.

First. The government says (Br. Op. 10) that Counts 2 and 3, alleged by petitioner to be invalid on their face (Pet. 13-15), "were dismissed on appeal on the Government's suggestion because of doubts concerning the proper application of Section 7207 of the Internal Revenue Code of 1954, following *Achilli v. United States*, 353 U. S. 373."

Inasmuch as petitioner argued at some length in his brief below (Brief for Appellant, 20-27) that "Counts 2 and 3 of the Indictment Did Not Allege an Offense, Since Section 7207 of the Internal Revenue Code of 1954 is Inapplicable to Estate Tax Matters," the Government's statement is thoroughly misleading. The fact is that the Government never for one moment admitted the invalidity of those counts at any time in the district court, and did not do

so anywhere until after petitioner's brief in chief was filed in the court below. See Pet. 14-15. To intimate, as the Government does, that the counts "were dismissed on appeal on the Government's suggestion because of doubts" (Br. Op. 10), is on a par with—and about as accurate—as saying that Cornwallis surrendered at Yorktown at his own suggestion. The fact is that in both instances the yielding took place in consequence of force applied by the opposition.

Second. The Government argues (Br. Op. 9) that "the evidence complained of would have been admissible under the first count even if it had stood alone." Petitioner conceded (Pet. 13) that, "even under Count 1 alone, evidence bearing on the genuineness or otherwise of the documents would have been admissible to the extent that it bore on the issue of the net amount of the decedent's estate."

The nub of petitioner's contention then followed:

> "But, absent Counts 2 and 3, such evidence would have been received under a different accusation, in a different atmosphere, and under a wholly different charge to the jury."

The Government has not even attempted to formulate a reply to this basic argument, which sets forth exactly why petitioner's conviction is tainted.

Third. The Government states (Br. Op. 10) that it "is considering clarifying legislation." Such a remedy, when and if it comes to pass, will not help petitioner in confinement. It is submitted that the conduct reflected in the present record, of the prosecution blowing cold in *Achilli* to urge that Section 7207 does not reach estate tax offenses (Pet. 13-14), and simultaneously blowing hot in the present case to convict petitioner for estate tax offenses under the same statute, and of then availing itself of the damaging evidence introduced thereunder to sustain the present conviction, meanwhile discarding the counts laid under Section 7207 so that an entirely different case remains, calls for

review of this case now. Improper closing argument (*Berger v. United States*, 295 U. S. 78; *Viereck v. United States*, 318 U. S. 236) should not be the only departure from accepted standards of prosecutor conduct that calls for review by this Court.

Respectfully submitted,

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July 1958.